

No. **79-455**

Supreme Court, U.S.
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**In the
Supreme Court of the United States**

OCTOBER TERM, 1978

JAMES INENDINO,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT**

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Petitioner, James Inendino, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The published opinion of the Court of Appeals is appended to this Petition as Appendix A. The appeal below was originally decided by unreported order on July 13, 1979 pursuant to Seventh Circuit Rule 35. The Seventh Circuit subsequently decided to issue the decision as an opinion.

JURISDICTION

The opinion of the Court of Appeals was entered on July 13, 1979. Petitioner's petition for rehearing, timely filed, was denied on August 20, 1979. The jurisdiction of this court is invoked pursuant to 28 U.S.C. 1254(1) and Rule 22.2 of the Rules of this Court.

QUESTIONS PRESENTED

1. Whether as applied here, the dangerous and special offender act is unconstitutional, and the sentence enhancement to 20 years illegal, cruel and unusual.
2. Whether Petitioner was deprived of his Constitutional right to a fair trial where the Government consistently and prejudicially propounded improper questions and offered inadmissible evidence of other crimes in no way shown to be related to Petitioner.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

"No person shall be . . . deprived of life, liberty, or property, without due process of law; . . ."

The Eighth Amendment to the United States Constitution provides, in pertinent part:

". . . nor cruel and unusual punishments inflicted."

STATEMENT OF THE CASE

In February of 1978, petitioner was charged, together with one Thomas McKillip, under Indictment 78 CR 70 with conspiring to violate Title 18, U.S.C., Sec. 2313, interstate transportation of stolen vehicles (R. 1, Count I). Additionally, Petitioner was charged under a substantive count within the same indictment (R. 1, Count V). Pre-

trial motions were denied and Petitioner alone elected to proceed to trial before the Honorable Judge Decker and a jury in the Northern District of Illinois, Eastern Division, commencing June 6, 1978.¹

A guilty verdict was returned as to both Counts I and V against Petitioner on June 12, 1978, after which bail was revoked on that date pending further proceedings which involved a petition filed by the Government to declare Petitioner a dangerous special offender under Title 18, U.S.C., Sec. 3575.

Thereafter, Petitioner attacked the Government's dangerous special offender petition, which attack was reviewed and denied in each particular by way of a memorandum decision of September 21, 1978 filed by Judge Decker.

On September 21, 1978, Judge Decker imposed sentence upon Petitioner. Petitioner was committed to the custody of the Attorney General for a period of twenty (20) years on each of the two counts on which he was convicted concurrent with each other but consecutive to a five (5) year sentence previously imposed under Indictment 76 CR 876.²

Pursuant to the judgment and finding of Judge Decker, and the invocation of the dangerous and special offender act, Petitioner appealed to the Seventh Circuit, challenging the propriety of his conviction where the Government propounded prejudicial questions and introduced inadmissible evidence of other crimes, and attacking the Constitution-

¹ Co-defendant McKillip was charged in each of the five (5) counts of this indictment. On June 6, 1978, McKillip, represented by separate retained counsel, entered his plea of guilty. Thereafter, McKillip's plea was vacated and he re-pled after an appeal and a confession of error by the Government.

² Petitioner was convicted after a jury trial of conspiracy to transport stolen, forged checks in interstate commerce in violation of Title 18, U.S.C., Sec. 371, *et seq.*, before the Honorable Judge Grady on May 5, 1978.

ality of the dangerous and special offender act as applied. The Seventh Circuit, in a published opinion, affirmed both Petitioner's conviction and the sentence imposed under the Act, finding no error in the Government's conduct and ruling the application of the dangerous and special offender act constitutional. Petition for rehearing, timely filed, was similarly rejected. (As appears in Appendix B.)

Petitioner remains in custody while pursuing this petition.

STATEMENT OF RELEVANT FACTS

On February 9, 1978, Petitioner and co-indictee Thomas McKillip were charged in a five (5) count indictment (R. 1; app. C). McKillip was charged in all five counts while Petitioner was charged in Counts I and V, alleging conspiracy under 18 U.S.C. 371 to violate 18 U.S.C. 2(b); Sec. 2312 and Sec. 2313.

The gist of the case revolved around the theft of two (2) tractors and a single trailer. The Government offered evidence that the thefts occurred in March 1974. The three (3) vehicles were a 1973 International Harvester tractor, a 1973 White tractor and a 1973 Obrecht flatbed trailer. As to the trailer, the Government offered evidence only of its recovery. For clarity, the statement of facts will be categorized according to vehicle and then to the dangerous and special offender act.

A. The 1973 International Harvester tractor.

According to the Government's proof, this tractor was stolen by Thomas Schremser in March 1974 together with Petitioner's co-indictee, McKillip.³

³ Schremser was an unindicted alleged accomplice; McKillip was a guilty pleading co-indictee. It was the Government's proof that Schremser and McKillip stole the truck from an Illinois dealership in March 1974 (R. 157-59).

After the tractor was stolen it was driven to a "paint-shop" operated by another unindicted alleged accomplice, Eugene "Michigan Mad Man" Phebus (R. 161, 194-196). According to Schremser, the International tractor, after it had been repainted by Phebus in 1974, was leased to the Flash Company and, thereafter, it was put to work for T & J and Company (R. 167-168).⁴ During the fall of 1974, this particular truck, at least according to Schremser, was dismantled, the engine and transmission being placed into a White truck (A. 170-172).

In 1977, state and federal agents went to the Flash Company in Cicero, Illinois, investigating a White Tractor (R. 582). In April of that year, the transmission was removed, although for some inexplicable reason not preserved by the agents as evidence. Some question arose as to whether that particular transmission originally came from the stolen International Harvester tractor.⁵

B. The 1973 White tractor.

Schremser testified that he and McKillip stole a late model White tractor from Worth, Illinois, in approximately March 1974 (R. 180-182). The tractor was then, according to Schremser, driven to Michigan City where Eugene Phebus painted the truck (R. 183-185). Again, according to Schremser, this particular White tractor was disposed of during the middle of 1975, the witness

⁴ "T & J" represent the first initials of Thomas McKillip and James Inendino, two defendants under the subject indictment.

⁵ A Government witness, Durham, brought records from the International Harvester and the records apparently indicated that the "Fuller" transmission seized from the White tractor in 1977 came from the International Harvester tractor, although the description of numbers differed (R. 525-533).

claiming that the White tractor was "cut up" (R. 189). Phebus then testified as a Government witness that at about the same time he painted the Harvester tractor, an additional White tractor was brought in by McKillip and Schremser for painting (R. 238-239). According to the testimony, McKillip paid for the painting (R. 239).

C. The 1970 Obrecht flatbed trailer.

This trailer was built in 1970 in Knox, Indiana and was sold to one Willard Jamison in 1974 (R. 98-105). Jamison was scheduled to pick up this trailer in Chesterton, Indiana. The particular trailer was 42 feet long with an aluminum body, bearing Serial No. 1551 (R. 104-109). According to the testimony of the Government witnesses, Schremser and McKillip stole this trailer in Michigan City, Indiana, upon returning from the Phebus garage (R. 172-173). In 1975 Schremser informed investigating agents as to the location of this trailer, whereupon the trailer was recovered.⁶

While a good deal of testimony has been deleted relative to the tracing of these three (3) vehicles, the gist of the actual theft of these vehicles has been related.

D. The Dangerous and Special Offender Act.

On June 12, 1978, the jury returned a verdict of guilty against Petitioner on Counts I and V and the Government moved that Petitioner's bail be revoked (R. 742). After much discussion, Petitioner eventually agreed to waive further release on bail pending a hearing on the Government's dangerous offender petition (R. 748-765).

⁶ FBI agent Keiser testified that the trailer was recovered in October 1975 and was ultimately returned to its owner, Mr. Jamison (R. 332-333).

On July 14, 1978, the petition came on for hearing before the District Court, at which time Judge Decker declined either to dismiss the Government's petition or transfer the petition to another judge.⁷ Additionally, the trial court assumed the position that the petition was received in timely fashion although filed after the guilty verdict (R. 775-781).

To support the special offender petition, the Government presented the witness Louis Almeida. Additionally, the Government offered prior felony convictions. Petitioner attacked the proceedings on the basis of the insufficiency of the testimony offered by the Government and the insufficiency of the prior felony convictions insofar as they lacked sufficient finality to fall within the parameters of the petition (R. 783-789).

The specifics of the testimony offered by the Government will be offered in the context of the reasons for granting the writ and, for the sake of brevity, will here be deleted. After continued hearing on July 19, 1978, the cause was continued for decision to September 21, 1978, at which time Judge Decker filed a memorandum decision overruling the several attacks made by Petitioner to the special offender petition and hearing. On this date, and after argument, Judge Decker sentenced Petitioner to concurrent twenty (20) year sentences on each of the two counts for which he was convicted, however, running this concurrent sentence consecutive to the sentence of five (5) years imposed by Judge Grady (R. 30-32).

⁷ At the time the Government made the request for revocation of bail and for invocation of the special offender provisions, there was pending and undisposed a similar petition before Judge Grady (R. 748-753; 756-759).

REASONS FOR GRANTING THE WRIT

1. The decision below, in accepting the amorphous and unbridled standards of the dangerous and special offender act, sets a dangerous precedent never before reviewed by this Court.

PREFATORY NOTE

To highlight what was brought out below, there is something indeed unusual about this case. On March 7, 1978, Petitioner was convicted after a jury trial before Judge Grady in the Northern District of Illinois, Eastern Division. Prior to that sentencing, the Government filed a dangerous offender petition before Judge Grady (R. 758-764). For reasons clear only to the Government, the prosecutors elected to proceed on the instant conviction which followed rather than the one which occurred before Judge Grady. While the Government offered reasons of timing in explanation for their selection, the question of "forum-shopping" was never firmly resolved below. It is, in any event, highly unusual for the Government to have foregone the opportunity to seek an enhanced penalty before one judge, while seeking an enhanced penalty before a second judge.⁸

Addressing the Government's petition itself, Petitioner attacks the constitutionality of the dangerous special of-

⁸ The second judge, Judge Decker, himself assumed, at least initially, that the special offender hearing would proceed before Judge Grady, stating:

"Well, I am not going to go ahead with any hearing and preclude—Judge Grady has tried his case; this defendant (Petitioner herein) is waiting for him, he's waiting for this defendant, and I expect him to proceed and let you gentlemen appear before him." (R. 763).

fender statute and the resultant Draconian sentence it produces.

A. Title 18, U.S.C., Sec. 3575 was unconstitutionally applied to Petitioner.

On June 12, 1978, a guilty verdict was returned under Counts I and V of the subject indictment, charging Petitioner with conspiracy and a substantive count which related to the aforementioned stolen trucks. Each offense carried a maximum five-year penalty. During the afternoon of June 12, 1978, the Government presented a petition, seeking of Judge Decker to declare Petitioner a special and dangerous offender. At this time, Judge Decker was advised that a similar petition was pending and yet undisposed before Judge Grady.

The Government's petition was attacked, inter alia, on the ground that a "preponderance of the information" was an unsatisfactory degree of proof in a criminal case (R. 780).

Hearings concerning the Government's petition began on July 14, 1978 and resumed on July 19, 1978, terminating on that date. To support the special offender petition the Government introduced two categories of evidence: prior felony convictions and the testimonial evidence of Louis Almeida. Under Category One, the Government showed that in 1971 Petitioner was convicted in the federal court in Chicago under Indictments 70 CR 295 and 70 CR 572, for which he received concurrent custodial sentences on each indictment. In March, 1978, Defendant was convicted under Indictment 76 CR 876. In June, 1978, the Defendant was convicted in this case, 78 CR 70. Petitioner contended that these prior felony convictions lacked sufficient finality due to their concurrent or appellate status to fall within the parameters of the special and dangerous offender act. Judge Decker rejected this contention.

As to the second category, Louis Almeida offered testimony concerning the theft of certain trailers in which Petitioner was allegedly involved. Additionally, Almeida offered testimony concerning an alleged plot to kill one Robert Harder in which Petitioner was allegedly involved. The actual murder never transpired according to the testimony. Additionally offered was the testimony of FBI Agent Quinby concerning certain court authorized wiretaps mechanically transferred into a "composite" which contained five (5) conversations allegedly involving Petitioner in illicit activity. Based on this evidence, Judge Decker adjudicated Petitioner a special and dangerous offender, rejecting Petitioner's contention that the degree of proof delineated in that statute was constitutionally infirm. Thereafter, on September 21, 1978, Judge Decker sentenced Petitioner to twenty (20) years in custody, consecutive to the five (5) year sentence earlier imposed by Judge Grady.

In *United States v. Neary*, 552 F.2d 1184 (1977), the Seventh Circuit affirmed the conviction and sentence, wherein defendant received sentence of one day over the maximum. *Neary* presented to the Seventh Circuit a claim of denial of equal protection in the manner by which the court imposed sentence. Now confronted with successive petitions, the Seventh Circuit in *Neary* stated:

"Without a claim by the defendant that prosecutorial selectivity has been based on an unjustifiable standard such as race, religion or other arbitrary classification, there is no basis for finding denial of equal protection." Id. at 1193.

Unlike *Neary*, the instant case portrays a portrait of just such improper prosecutorial selectivity amounting to denial of Petitioner's right to equal protection of the law. Quite simply, no satisfactory explanation may be provided for the successive petitions filed by the Government before

separate judges within weeks of one another. It is plain on this record that the Government feared the first petition would go for naught and utilized the vehicle of successive indictment as a form of vindictive prosecution and impermissible prosecutorial selectivity, effecting a denial of equal protection to Petitioner. See *United States v. Groves*, 571 F.2d 450 (9 Cir., 1978).

B. The concepts of "dangerousness" and "special" as found in the act are impermissibly vague.

Petitioner is cognizant that the Circuits considering the statute now being questioned have found it both viable and constitutional.⁹ However, this court has yet to speak on the constitutionality of the statute and, in view of its increased utilization, it is ripe for such discussion.

Here, Petitioner questions the constitutional validity of the procedure prescribed in Section 3575 of United States Code, Title 18, both as it underlies a finding that a given individual is a "special" offender and as it underlies a finding that an individual is "dangerous", as defined in Sections B and F, respectively.¹⁰

The next question thus arises as to when a special offender is special within the meaning of the statute. Quite simply, no reported decision has ever delineated the prosecutorial guidelines for the filing of a petition. What remains is unbridled Governmental discretion in the filing of a petition, or in this case petitions, wherein enhanced

⁹ *United States v. Fatico*, 579 F.2d 707 (2 Cir., 1978); *United States v. Warme*, 572 F.2d 57 (2 Cir., 1978); *United States v. Williamson*, 567 F.2d 610 (4 Cir., 1977); *United States v. Bowdach*, 561 F.2d 1160 (5 Cir., 1977); *Watkins v. United States*, 564 F.2d 201 (6 Cir., 1977).

¹⁰ Reproduced in Appendix C is Title 18, U.S.C., Sec. 3575.

penalties may be sought. The very absence of such guidelines make the utilization of this statute suspect. Under the standards enunciated by the Seventh Circuit in the decision below, every "twice-convicted . . . recently released citizen" is subjected to the possibility of greatly accelerated punishment at the whim of the Government. Unless this court agrees to rectify this situation, a dangerous precedent has been set.

For guidance on this issue, the court is commended to a similar constitutional attack mounted in the Seventh Circuit. In *United States v. Batchelder*, 581 F.2d 626 (7 Cir., 1978), cert. granted S.Ct. (1979), the Seventh Circuit ruled that certain related weapons statutes (18 U.S.C. 922(h) and 1202(a)) could not be left solely within the hands of the prosecution (e.g., 922(h) carries a five-year penalty and 1202(a) carries a two-year penalty). The Seventh Circuit avoided the constitutional issue, rather directing that the case be remanded for the imposition of the two-year penalty.

With regard to statutory construction of the statutes considered in *Batchelder*, the Seventh Circuit reviewed the "void for vagueness" contention under the Fifth Amendment and the due process and equal protection contentions under the Fifth Amendment as they concerned the constitutional implications of prosecutorial discretion, stating:

"Assuming that the protection against vague criminal legislation extends to the punishment provision (citation omitted), the statute may be void for vagueness under the Fifth Amendment. As Justice Black suggested, 'A basic principle of our criminal law is that the Government only prosecutes people for crimes under statutes passed by Congress which fairly and clearly define the conduct made criminal and the punishment which can be administered.' (citation omitted).

At least in the absence of published guidelines by the prosecutor (citation omitted), the second type of constitutional protection implicated is the due process and equal protection interest in avoiding excessive prosecutorial discretion and in obtaining equal justice." Id. at 631.

Without sharply delineated guidelines, just such excessive prosecutorial discretion inheres under the instant statute.

Similarly distressing is the amorphous nature of the concept "dangerous" which inheres in the statute. All the frailties attendant to the definition of "special" may be found with equal application in this concept. More particularly, to denominate someone as dangerous simply because, in the unbridled discretion of the Government, it is somehow determined that a period of confinement longer than that provided for such felony is required is constitutionally infirm; especially where, as here, the hearing on dangerousness proceeded at a time when the court could only deal in assumptions concerning Petitioner's criminal record as the appeals in two of the convictions were not finally decided.

C. The "preponderance of the evidence" degree of proof is an unrealistic and unconstitutional evidentiary standard.

This statute allowing the Government to make and establish by a "preponderance of the evidence" new criminal charges in a Section 3575 sentencing proceeding in order to justify further criminal punishment is untenable.

In nothing more than a sentencing hearing, the trial judge is permitted to determine an individual's guilt or innocence on alleged criminal charges by a "preponderance of the information" as produced by the Government. On the basis of such determination, the individual can be

labeled "dangerous" and subjected to the statute's enhanced sentencing. It is important to note in this regard that the determination is not based on any legally fixed standards, again violative of the individual's due process rights, as the standard, if one may be discerned, is unduly vague and uncertain.

Petitioner does not dispute the trial judge's legal entitlement to broad discretion in a sentencing decision and the information upon which those sentences are based. However, that discretion is allowed primarily because there is a definite penalty prescribed for the crime of which the Defendant has been convicted. Unlike the usual sentencing situation, under Section 3575, the Defendant may be brought to a sentence beyond the maximum of that prescribed for his crime, as was done here.

The degree of proof by a "preponderance of the information" quite simply cannot be constitutionally sustained. What is at issue is not the voluntariness of a confession or the degree of proof required to challenge the Fourth Amendment intrusion. What is at issue is the degree of proof necessary to sustain a substantially enhanced sentence. As that is the case, "preponderance" is unrealistic. Where liberty is involved, Petitioner suggests at least that the standard ought to be above that of a simple negligence case. See, e.g., *Woodby v. Immigration Service*, 385 U.S. 276 (1966).

Commended to the consideration of this court is the "beyond a reasonable doubt" standard applicable in capital cases. *Gregg v. Georgia*, 428 U.S. 153, 164 (1976). There simply is no realistic difference between the degree of proof required in a capital case and the sentencing of a special offender to a prison term for twenty-five years where that prisoner is, as here, forty years of age at the time of sentencing. It is little more than an exercise in

sophistry to choose between the two and Petitioner urges rejection of so meager a standard as "preponderance."

D. The statute as applied to Petitioner is cruel and unusual.

While considering the various frailties of the special and dangerous offender statute, Petitioner urges this court to be mindful of the peculiarly onerous results that flow from a sentence imposed under the act. Resulting confinement is above and beyond that suffered by the ordinary inmate. For example, the special offender is denied furloughs, transfers, minimum security programs and ordinary parole eligibility. *United States v. Fatico*, 458 F.Supp. 388 at 401 (E.D.N.Y. 1978). Thus, the "special and dangerous offender" classification carries not only the enhanced penalty, but the unusual consequences of irregular federal confinement. Denial of these programs to the prisoner inmate may so seriously debilitate his rehabilitation as to render this statute unconstitutional by virtue of its being cruel and unusual punishment.

In light of the total lack of guidelines and under the peculiar circumstances of this case, Petitioner urges that the statute as applied be declared lacking in constitutionality.

2. The decision below raises significant and recurring problems concerning unnecessary offers by the Government of prejudicial evidence or prejudicial argument.

In recent years, a number of new trials have been ordered based on the unnecessary offer by the Government of either prejudicial evidence¹¹ or prejudicial argument.¹²

¹¹ See, e.g., *United States v. Ostrowsky*, 501 F.2d 318 (7 Cir., 1974) (other crimes).

¹² See, e.g., *United States v. Vargas*, 583 F.2d 380 (7 Cir., 1978) (improper argument).

The case at bar is fraught with the same errors, albeit sometimes subtle, which in combination thrust the result of the trial well below the plimsoll line of fairness.

The Government offered direct evidence that McKillip, the guilty pleading co-indictee of Petitioner, stole each of the three vehicles alleged in the indictment. More particularly, the Government's direct evidence as to both theft and transportation of these three vehicles came before the trial jury through the lips of two accomplice witnesses, Schremser and Phebus. These individuals testified that Schremser and McKillip stole the trucks in question, while Phebus painted these trucks during the spring of 1974. The only other direct evidence related to the recovery of the trailer and the disposition of the two trucks.

Beyond this, the Government could only offer speculative relationships, unreasonable questions, straw-man impeachment, unconnected physical evidence, and improper and prejudicial argument.

A. Alleged statements by co-conspirator Thomas McKillip.

On trial, the Government, as seen above, offered no direct evidence that Petitioner James Inendino stole or was responsible for the theft of the vehicles in question. The only link, however strained, were statements allegedly made by Thomas McKillip, who did not testify at this trial, related by the Government witness Schremser, an alleged accomplice.

The court below relied heavily on Rule 801(d)(2)(E) of the Federal Rules of Evidence as authority for allowing all the statements the witness Schremser testified McKillip made because the Rule states that "a statement is not hearsay if . . . the statement is offered against a party and is . . . a statement by a co-conspirator of the party during

the course and in furtherance of the conspiracy." However, that Rule may not be allowed to bootstrap hearsay against Petitioner Inendino absent any statements or conduct of his own by which it may be determined he was a part of the conspiracy *aliunde* the statements attributed to McKillip. In this case, quite simply, there was no independent nexus between Petitioner Inendino and a conspiracy to justify invocation of the Rule.

More distressing is the fact that in Petitioner's brief below was cited *United States v. Guajardo-Melendez*, 401 F.2d 35 (7 Cir., 1968) wherein, the Seventh Circuit reversed a conviction presenting the same circumstances as those attendant to the case at bar. As such, it is Petitioner's position that there is either an intracircuit conflict between the decision below in *Melendez* or *Melendez* was tacitly overruled.

B. The Government engaged in unreasonable prosecutorial questions propounded to the witnesses Schremser and Phebus.

Replete in this record throughout the entire questioning of the Government witnesses Phebus and Schremser are questions propounded by the Government calculated to allow the witnesses to opine, guess, conjecture and surmise things about Inendino which could not be stated under any theory of law and only serve to prejudice Petitioner, contributing heavily to his conviction.

Under like circumstances, Petitioner below presented the Seventh Circuit decisions in *United States v. Meeker*, 558 F.2d 387 (1977) and *United States v. Lozano*, 511 F.2d 1 (1975), to the effect that the questioning of such witnesses was plainly objectionable. As the decision below failed even to address these cases, Petitioner was effectively de-

nied his full right to appellate review and urges consideration by this court as to whether the *Meeker* and *Lozano* decisions create an intracircuit conflict or are no longer valid law.

**C. The "straw-man" impeachment of the witness
"Red" Barnes.**

At trial, the Government called one Red Barnes as a witness. What is unusual about the presentation by the Government of Barnes is that there is absolutely no legitimate basis for his testimony. Barnes never mentioned Petitioner James Inendino's name, nor could Barnes testify that any truck or cab that was shown to have been possessed by Petitioner Inendino was in any way related to the witness Barnes or the truck lot about which he was questioned. While there was considerable discussion concerning a White truck or a Diamond T truck, since there are thousands of such trucks in existence, the testimony was absolutely unconnected and unprobative.

The reason for which Barnes was in fact called was to enable the Government to bring in FBI Agent Keiser to testify under the guise of impeachment pursuant to Rule 607 and 613 of the Federal Rules of Evidence.

While Petitioner has no quarrel with the general rule permitting attack upon the credibility of a witness by the party calling him, Petitioner did cite below *United States v. Shoupe*, 548 F.2d 636 (6 Cir., 1977) where the Sixth Circuit reversed an armed robbery conviction where the Government used a similar tactic. See also, *United States v. Quinto*, 582 F.2d 224 (2 Cir., 1978) where a tax evasion conviction was reversed for tactics similar to the Barnes' incident.

In rejecting *Shoupe* and *Quinto*, the Seventh Circuit has ignored applicable case law and created an intercircuit conflict.

E. The prosecutor improperly and prejudicially interjected his personal knowledge in rebuttal closing argument in derogation of established case law.

In the rebuttal portion of the prosecutor's closing argument in this cause, the prosecutor argued, "Well, you and I, ladies and gentlemen, know who took the tractor to Phebus' garage. Phebus said he wasn't there when he did it." (R. 689). Here the prosecutor, over objection, was permitted to act as a thirteenth juror, interjecting his own personal knowledge when he stated to the jury that he knew who took the tractors to the Phebus garage. Such improper and prejudicial commentary has uniformly been held to constitute reversible error for the great weight it carries in the mind of the jurors. The law is too plain to require citation that a prosecutor may inject no personal knowledge of the matter and his assertion in that context requires reversal. By the affirmance of the decision below, the Seventh Circuit has rejected a uniform axiom of criminal jurisprudence.

CONCLUSION

For any and all of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 78-2268

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JAMES INENDINO,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 78 Cr 70 — BERNARD M. DECKER, *Judge.*

ARGUED MAY 21, 1979 — DECIDED JULY 13, 1979*

Before TONE, *Circuit Judge*, PECK, *Senior Circuit Judge*,** and WOOD, *Circuit Judge.*

PER CURIAM. In February 1978 a special grand jury returned a five count indictment against defendants James

* This appeal was originally decided by unreported order on July 13, 1979. See Circuit Rule 35. The court has subsequently decided to issue the decision as an opinion.

** Honorable John W. Peck, Senior Circuit Judge of the United States Court of Appeals for the Sixth Circuit, is sitting by designation.

Inendino and Thomas McKillip. McKillip was charged in all five counts and Inendino was charged in count one, conspiracy in violation of 18 U.S.C. § 371, and count five, receiving and concealing stolen motor vehicles in interstate commerce in violation of 18 U.S.C. § 2313.¹ McKillip subsequently entered a plea of guilty. Inendino pleaded not guilty. After a five-day trial the jury found Inendino guilty of both offenses. In September 1978 the district court judge sentenced Inendino to 20 years imprisonment under 18 U.S.C. § 3575.

In this appeal the defendant advances two contentions: (1) the defendant was denied a fair trial because the prosecutor improperly questioned witnesses, offered irrelevant and prejudicial evidence, and commented improperly in the closing argument, and (2) the defendant was improperly sentenced under the dangerous special offender statute, 18 U.S.C. § 3575. Finding no merit to either of these arguments, we affirm.

I. THE PROSECUTION'S CONDUCT

The defendant in his brief questions the following: (a) the introduction into evidence of statements made by Inendino's co-conspirator McKillip to Government witness Thomas Schremser, (b) the prosecutor's questioning of Government witnesses Schremser and Phebus, (c) evidence relating to the impeachment of Government witness Kenneth Barnes, (d) the evidence relating to trailer seals found on Barnes' premises in a wrecked tractor cab, (e) evidence relating to the "arrests" of McKillip and Schremser in McHenry County, Illinois, (f) the evidence relating to the keys found in McKillip's possession, and

¹ The three vehicles stolen in March 1974 were a 1973 International Transtar Tractor, a 1973 White Tractor and a 1970 Obrecht Flatbed Trailer.

(g) the prosecutor's statement of personal knowledge in the rebuttal argument. Each is discussed in turn.

A. The Evidence of Co-Conspirator

McKillip's Statements

Defendant Inendino was accused in count one of conspiring with McKillip in the interstate transportation of stolen motor vehicles, the receipt and concealment of stolen motor vehicles in interstate commerce, and the interstate transportation of stolen property. Schremser, a witness for the Government, testified that, before the 1973 White tractor was stolen by himself and McKillip, McKillip told him that "Jimmy [Inendino] was looking for a replacement for one of his tractors" and that "Jimmy would pay \$500 for a replacement." Schremser also testified that when he and McKillip were locating a truck to steal, McKillip told him that they were finding a truck for Jimmy. The defendant claims, apparently, that these statements were hearsay deserving exclusion. Rule 801(d)(2)(E) of the Federal Rules of Evidence provides that "[a] statement is not hearsay if . . . the statement is offered against a party and is . . . a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy." We believe that "some reasonable basis" exists for concluding that both statements were made in furtherance of the conspiracy. *United States v. Mackey*, 571 F.2d 376, 383 (7th Cir. 1978). See also *United States v. Knippenberg*, 502 F.2d 1056, 1061 (7th Cir. 1974). The district court properly admitted the evidence.

B. The Prosecutor's Questions to Government

Witnesses Schremser and Phebus

The defendant complains that the prosecutor continually proffered objectionable questions to Schremser. After

Schremser testified that McKillip told him that Inendino owned the 1973 White truck until 1975 when the tractor was "cut up," the Government asked Schremser the reason McKillip gave for "chopping up" the truck. The witness answered in this colloquy:

A. He said that the FBI had been getting too close to their operation.

Q. To "their operation"?

A. Yes.

Q. Did he say to whom he was referring by "their operation"?

A. He meant himself and Jimmy.

The defendant objected and asked the district court to strike "[h]e meant himself and Jimmy" because the sentence was subjective. The district court sustained the defendant's objection to the words "he meant." The line of questioning then ceased. We find nothing in the two questions above which warrants reversal. The defendant also claims that the prosecutor improperly questioned Government witness Thomas Phebus about the manner in which the witness dealt with Inendino and McKillip. Having examined the record we find that claim is frivolous.

C. Evidence Relating to the Impeachment of Kenneth Barnes

The Government called Barnes, former owner of a truck sales and service business, as a witness. During direct examination the prosecutor questioned Barnes about a conversation between him and FBI Special Agent Terry Keiser and asked, "Did you tell [the agent] that you purchased the cab and the chassis from G & G Leasing?" The witness answered, "No, I did not." The remainder of Barnes' testimony was evasive and incomplete. Next the Government called Special Agent Keiser who testified about his visit to the Barnes' garage and about a wrecked tractor cab

found on the premises. During direct examination the prosecutor asked Keiser, "When you spoke with [Barnes] on [August 22] did he tell you where he got the cab from?" The witness answered, "Yes. He told me he purchased it from G & G Leasing." The defendant asserts that the admission of this testimony is "clearly" a reversible error. We disagree. Rule 607 of the Federal Rules of Evidence provides that "[t]he credibility of a witness may be attacked by any party, including the party calling him." Furthermore, Rule 613 of the Federal Rules of Evidence permits impeachment by the use of prior inconsistent statements. Barnes was evasive; the district court judge issued a cautionary instruction to the jury; and the testimony to which the defendant objects did not specifically mention Inendino.

D. Evidence Relating to Trailer Seals Found on Barnes' Premises

During direct examination Agent Keiser testified that when he visited the Barnes lot he searched inside a wrecked tractor cab; similar to the stolen White tractor, and discovered two unbroken seals.² The seals were registered to "Jim Idino" from "Flash." Inendino argues that these seals should not have been admitted as evidence because they tended to show that he was involved in "other crimes" — "the theft of goods, wares or merchandise from loaded trailers." The seals were obviously offered for the purpose of connecting the defendant with the wrecked tractor. Showing that this tractor was connected with Inendino corroborated Schremser's testimony that the stolen 1973 White truck was a replacement. It is inconceivable that the jury could have inferred from the introduction of these seals

² Seals are used to protect a loaded trailer during shipment. The seal mechanism is a metal strip that is slipped through the latches of the trailer door and the locking bar and then locked.

that Inendino was involved in stealing from loaded trailers. In fact, Don Nega, distributor of the seals, testified that Inendino legitimately received the seals. Agent Keiser testified, furthermore, that the locked seals are used to protect a loaded trailer and that these seals were unbroken.

E. Evidence Relating to the "Arrest" of McKillip and Schremser

The defendant claims that the "arrest" of McKillip and Schremser in McHenry County is prejudicial "evidence of other crimes." However, a close examination of the record questioned by the defendant reveals no statement about an arrest.³ The evidence shows that at 11:30 p.m. in October 1974 Patrolman McKeating and his partner of the McHenry County Sheriff's office found a red semi-trailer International Transtar truck near the Friendly Equipment Company and subsequently found two men, McKillip and Schremser, near a Friendly Equipment building. Patrolman McKeating advised them that the business was closed. McKeating testified that later he found an open door on the north side of the building and observed "the two men go up to several trucks and open them and go inside and come back outside again."

From this testimony the jury may have surmised that witnesses McKillip and Schremser were engaged in some illegal activity, but we cannot say that the district court judge abused his discretion in admitting the evidence. The International Transtar driven by McKillip and Schremser was previously stolen from Fox Valley Rental and Leasing. Within a few days after this incident in McHenry County,

³ Schremser testified earlier that, when he was a driver for T & J Trucking, the International Transtar truck was repainted once in March 1974 and again in October or November 1974, after "McKillip and I were arrested in McHenry County." No further details were mentioned and the defendant failed to register any objection.

Schremser had the truck repainted blue at Knight's Body Shop in Lyons, Illinois. The repainting job was paid for by a T & J Trucking company check. From Knight's testimony, moreover, the jury may have reasonably inferred that Inendino arranged the repainting. The evidence was relevant and material to the charges in the indictment.

F. The Evidence Relating to the Ignition Keys Found in McKillip's Possession

Deputy Sheriff Charles Terrell testified that when he arrived at the Friendly Equipment Company that evening he found a red and white International Transtar tractor with a sign reading "T & J Trucking." Inside the tractor he found a set of ignition keys. The defendant challenges the admissibility of the keys, apparently, because he asserts that they are "evidence of other crimes." The defendant, however, failed to object to the admission of the keys. We note nonetheless that McKillip's possession of the tryout keys corroborates Schremser's earlier testimony that when he and McKillip stole the White tractor from Langway Express, McKillip gave him a ring of approximately 20 keys which Schremser used until one of the keys started the White tractor. The evidence was properly admitted.

G. The Prosecutor's Statement of Personal Knowledge in the Rebuttal Argument

Inendino complains that the prosecutor stated his personal knowledge when in the rebuttal argument he commented, "Well, you and I, ladies and gentlemen, know who took the tractor to Phebus' garage. Phebus said he wasn't there when he did it." The defendant interrupted, the district court judge announced that he would rely on the jury's recollection of the evidence, and the prosecutor clarified his remark saying that he was referring to Schremser's testimony where the witness stated that he

and McKillip drove the stolen White truck to Phebus' garage and that no one was present when he arrived. In these circumstances we find no prosecutorial misconduct as the prosecutor's rhetorical comment was properly based on Schremser's testimony.

H. Summary

The defendant urges that the above examples of prosecutorial misconduct warrant reversal of his convictions. It is clear, however, that there was no misconduct and that, therefore, the defendant's cases, *see United States v. Meeker*, 558 F.2d 387 (7th Cir. 1977); *United States v. Lozano*, 511 F.2d 1 (7th Cir.), *cert. denied*, 423 U.S. 850 (1975), are inapplicable. The district court judge, furthermore, has broad discretion in relation to the admission of evidence and the defendant failed to show that the judge abused his discretion.

II. THE DEFENDANT'S SENTENCE

The defendant launches a four-pronged attack upon his sentence imposed under the dangerous special offender statute, 18 U.S.C. § 3575, asserting that (a) provisions of the dangerous special offender statute are unconstitutional, (b) the district court erred in admitting hearsay testimony in the sentencing hearing, (c) there was an abuse of prosecutorial discretion, and (d) the prosecution engaged in "forum shopping."

Judge Decker found that Inendino was a special offender as a recidivist within 18 U.S.C. § 3575(e)(1) and based his finding upon court records and the defendant's own acknowledgment of his prior convictions. The judge stated that "I don't think there can be any question that the defendant qualified as a special offender." We agree. Section 3575(b) provides in pertinent part:

If it appears *by a preponderance of the information*, including information submitted during the trial

of such felony and the sentencing hearing and so much of the presentence report as the court relies upon, that the defendant is a dangerous special offender, the court shall sentence the defendant to imprisonment for an appropriate term not to exceed twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law for such felony.

18 U.S.C. § 3575(b) (emphasis added). The defendant contends that Section 3575 is constitutionally infirm because the statute authorizes findings of fact "by the preponderance of the information," rather than by the constitutionally mandated standard of beyond a reasonable doubt. This section, however, does not create a separate criminal charge but instead provides for the enhancement of the penalty for the defendant's criminal conviction. Also, the courts of appeals have uniformly found that the proof of dangerousness by a preponderance of the information is constitutional. *United States v. Williamson*, 567 F.2d 610 (4th Cir. 1977); *United States v. Bowdach*, 561 F.2d 1160 (5th Cir. 1977); *United States v. Stewart*, 531 F.2d 326 (6th Cir.), *cert. denied*, 426 U.S. 922 (1976). *See generally United States v. Neary*, 552 F.2d 1184 (7th Cir.), *cert. denied*, 434 U.S. 864 (1977).

The argument that the district court erred in admitting hearsay testimony in the sentencing hearing is without merit. In considering a sentence the trial judge may conduct a broad inquiry which is "largely unlimited either as to the kind of information he may consider, or the source from which it may come." *United States v. Tucker*, 404 U.S. 443, 446 (1972); *United States v. Cardi*, 519 F.2d 309, 313 (7th Cir. 1975). The sentencing court under the dangerous special offender statute retains the same broad discretion as in the usual sentencing procedure. *United States v. Williamson*, 567 F.2d 610, 615 (4th Cir. 1977). *See also* 18 U.S.C. § 3577.

Disposing of the remaining assertions, we need only say that Congress provided that the initial impetus for invoca

tion of the dangerous special offender statute rests within the sound discretion of the prosecutor, 18 U.S.C. §3575(a). The prosecutor, who in a petition detailed the facts upon which the decision was based, did not abuse his discretion. In a related attack the defendant complains that by pursuing the dangerous special offender petition in this case before Judge Decker and by abandoning the same kind of a petition in another case before Judge Grady the prosecution engaged in "forum shopping." The defendant raised no objection in the district court. Section 3575(f) provides that a defendant is dangerous if the maximum period of confinement provided for the defendant's felony conviction is insufficient to protect the public from further criminal activity by the defendant. In the case before Judge Grady, Inendino was convicted of ten counts of committing the crime of interstate transportation of forged securities in violation of 18 U.S.C. § 2314 and one count of conspiracy in violation of 18 U.S.C. § 371. For those crimes the defendant could have been imprisoned for 105 years.⁴ In the present case Inendino was convicted of one count of conspiracy and one count of receiving and concealing stolen motor vehicles in interstate commerce. Here the defendant faced a maximum of 10 years in prison.⁵ It is clear, therefore, that the prosecution had a sound reason for dismissing the petition in front of Judge Grady and pursuing the one in front of Judge Decker.

The defendant's convictions and sentence are affirmed.

AFFIRMED.

A true Copy:

Teste:

.....
Clerk of the United States Court of
Appeals for the Seventh Circuit

⁴ Inendino also faced a possible fine of \$110,000.

⁵ The defendant also could have been fined \$15,000.

APPENDIX B

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

August 20, 1970.

Before

Hon. Robert A. Sprecher, Circuit Judge

Hon. John W. Peck, Senior Circuit Judge*

Hon. Harlington Wood, Jr., Circuit Judge

UNITED STATES OF AMERICA,

No. 78-2268

Plaintiff-Appellee,

vs.

JAMES INENDINO,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.

No. 78 Cr 70

Bernard M. Decker, *Judge*.

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by counsel for the defendant-appellant, all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

* Honorable John W. Peck, Senior Circuit Judge of the United States Court of Appeals for the Sixth Circuit, is sitting by designation.

APPENDIX C**18 U.S.C. §3575****18 U.S.C. §3575. Increased sentence for dangerous special offenders**

(a) Whenever an attorney charged with the prosecution of a defendant in a court of the United States for an alleged felony committed when the defendant was over the age of twenty-one years has reason to believe that the defendant is a dangerous special offender such attorney, a reasonable time before trial or acceptance by the court of a plea of guilty or nolo contendere, may sign and file with the court, and may amend, a notice (1) specifying that the defendant is a dangerous special offender who upon conviction for such felony is subject to the imposition of a sentence under subsection (b) of this section, and (2) setting out with particularity the reasons why such attorney believes the defendant to be a dangerous special offender. In no case shall the fact that the defendant is alleged to be a dangerous special offender be an issue upon the trial of such felony, be disclosed to the jury, or be disclosed before any plea of guilty or nolo contendere or verdict or finding of guilty to the presiding judge without the consent of the parties. If the court finds that the filing of the notice as a public record may prejudice fair consideration of a pending criminal matter, it may order the notice sealed and the notice shall not be subject to subpoena or public inspection during the pendency of such criminal matter, except on order of the court, but shall be subject to inspection by the defendant alleged to be a dangerous special offender and his counsel.

(b) Upon any plea of guilty or nolo contendere or verdict or finding of guilty of the defendant of such felony, a hearing shall be held before sentence is imposed, by the

court sitting without a jury. The court shall fix a time for the hearing, and notice thereof shall be given to the defendant and the United States at least ten days prior thereto. The court shall permit the United States and counsel for the defendant, or the defendant if he is not represented by counsel, to inspect the presentence report sufficiently prior to the hearing as to afford a reasonable opportunity for verification. In extraordinary cases, the court may withhold material not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, any source of information obtained on a promise of confidentiality, and material previously disclosed in open court. A court withholding all or part of a presentence report shall inform the parties of its action and place in the record the reasons therefor. The court may require parties inspecting all or part of a presentence report to give notice of any part thereof intended to be controverted. In connection with the hearing the defendant and the United States shall be entitled to assistance of counsel, compulsory process, and cross-examination of such witnesses as appear at the hearing. A duly authenticated copy of a former judgment or commitment shall be prima facie evidence of such former judgment or commitment. If it appears by a preponderance of the information, including information submitted during the trial of such felony and the sentencing hearing and so much of the presentence report as the court relies upon, that the defendant is a dangerous special offender, the court shall sentence the defendant to imprisonment for an appropriate term not to exceed twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law for such felony. Otherwise it shall sentence the defendant in accordance with the law prescribing penalties for such felony. The court shall place in the record its findings, including an identification

of the information relied upon in making such findings, and its reasons for the sentence imposed.

(c) This section shall not prevent the imposition and execution of a sentence of death or of imprisonment for life or for a term exceeding twenty-five years upon any person convicted of an offense so punishable.

(d) Notwithstanding any other provision of this section, the court shall not sentence a dangerous special offender to less than any mandatory minimum penalty prescribed by law for such felony. This section shall not be construed as creating any mandatory minimum penalty.

(e) A defendant is a special offender for purposes of this section if—

(1) the defendant has previously been convicted in courts of the United States, a State, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof for two or more offenses committed on occasions different from one another and from such felony and punishable in such courts by death or imprisonment in excess of one year, for one or more of such convictions the defendant has been imprisoned prior to the commission of such felony, and less than five years have elapsed between the commission of such felony and either the defendant's release, on parole or otherwise, from imprisonment for one such conviction or his commission of the last such previous offense or another offense punishable by death or imprisonment in excess of one year under applicable laws of the United States, a State, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision,

or any department, agency or instrumentality thereof; or

(2) the defendant committed such felony as part of a pattern of conduct which was criminal under applicable laws of any jurisdiction, which constituted a substantial source of his income, and in which he manifested special skill or expertise; or

(3) such felony was, or the defendant committed such felony in furtherance of, a conspiracy with three or more other persons to engage in a pattern of conduct criminal under applicable laws of any jurisdiction, and the defendant did, or agreed that he would, initiate, organize, plan, finance, direct, manage, or supervise all or part of such conspiracy or conduct, or give or receive a bribe or use force as all or part of such conduct.

A conviction shown on direct or collateral review or at the hearing to be invalid or for which the defendant has been pardoned on the ground of innocence shall be disregarded for purposes of paragraph (1) of this subsection. In support of findings under paragraph (2) of this subsection, it may be shown that the defendant has had in his own name or under his control income or property not explained as derived from a source other than such conduct. For purposes of paragraph (2) of this subsection, a substantial source of income means a source of income which for any period of one year or more exceeds the minimum wage, determined on the basis of a forty-hour week and a fifty-week year, without reference to exceptions, under section 6(a) (1) of the Fair Labor Standards Act of 1938 (52 Stat. 1602, as amended 80 Stat. 838), and as hereafter amended, for an employee engaged in commerce or in the production of goods for commerce, and which for the same period ex-

ceeds fifty percent of the defendant's declared adjusted gross income under section 62 of the Internal Revenue Act of 1954 (68A Stat. 17, as amended 83 Stat. 655), and as hereafter amended. For purposes of paragraph (2) of this subsection, special skill or expertise in criminal conduct includes unusual knowledge, judgment or ability, including manual dexterity, facilitating the initiation, organizing, planning, financing, direction, management, supervision, execution or concealment of criminal conduct, the enlistment of accomplices in such conduct, the escape from detection or apprehension for such conduct, or the disposition of the fruits or proceeds of such conduct. For purposes of paragraphs (2) and (3) of this subsection, criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.

(f) A defendant is dangerous for purposes of this section if a period of confinement longer than that provided for such felony is required or the protection of the public from further criminal conduct by the defendant.

(g) The time for taking an appeal from a conviction for which sentence is imposed after proceedings under this section shall be measured from imposition of the original sentence.

Added Pub.L. 91—452, Title X, § 1001(a), Oct. 15, 1970, 84 Stat. 948.
